



DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA-2022-0004]

Equivalent Protective Arrangements for Railroad Employees

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of final guidance.

SUMMARY: This is a notice of final guidance issued by the Federal Railroad Administration (FRA) in connection with statutorily required protective arrangements for employees impacted by certain projects financed by the Federal government.

DATES: The final guidance is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Summary

The final guidance (FRA Guidance) is available at <https://www.regulations.gov> under docket number FRA-2022-0004 and on the FRA website at <https://railroads.dot.gov/elibrary/equivalent-labor-protections>.

The FRA Guidance is intended to facilitate compliance with statutorily required protective arrangements under 49 U.S.C. 22905(c)(2)(B) for employees impacted by certain projects financed by the Federal government. The FRA Guidance describes both procedural and substantive protections. The substantive protections include dismissal

and displacement allowances and moving assistance, among other things. The procedural protections include opportunities for employees (or their representatives) to engage in negotiations with respect to application of the protections.

FRA intends to include the FRA Guidance as an appendix to all new grant and cooperative agreements subject to section 22905(c)(2)(B), and grantees will be required to ensure the inclusion of the FRA Guidance, as applicable, in all contracts for the FRA-funded project. Costs incurred to comply with the FRA Guidance and in a manner consistent with 2 CFR part 200 are eligible for reimbursement under the applicable grant.

II. Background

In 1976, pursuant to the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), representatives of the railroads and their employees agreed on “[f]air and equitable arrangements” to protect employees impacted by certain projects financed by the Federal government. The Secretary of Labor adopted these protections in a letter to the Secretary of Transportation dated July 6, 1976. FRA has placed a copy of this letter and the accompanying protections in the docket for this FRA Guidance. In general, these protections provide that a railroad employee who is adversely affected by a project receiving certain financing from the Federal government may be entitled to a displacement allowance or a dismissal allowance, among other benefits.

Many of FRA’s current discretionary grant programs, including the Consolidated Rail Infrastructure and Safety Improvements Program and the Federal-State Partnership for Intercity Passenger Rail Program, are subject to the grant conditions described in 49 U.S.C. 22905(c). As relevant here, section 22905(c)(2)(B), requires grant applicants, for any grant for a project that uses rights-of-way owned by a railroad, to agree to comply with “the protective arrangements that are equivalent to the protective arrangements established under” the 4R Act. While this requirement is a condition of many FRA grants, it is not often applicable (as FRA’s grants do not typically cause an adverse

impact to railroad employees). With that said, FRA developed the FRA Guidance to assist grantees and to facilitate compliance with these important protections.

As a condition of receiving funding for a project subject to section 22905(c), FRA grantees must comply with protective arrangements equivalent to those provided under the 4R Act. FRA includes this requirement in the binding and enforceable grant agreement between FRA and the grant recipient. As described above, FRA grant agreements will be supplemented by the FRA Guidance, which clarifies the application of the protections to FRA grant programs. Because section 22905(c)(2)(B) specifically requires protective arrangements “equivalent” to those established under the 4R Act, FRA did not change the protections adopted by the Secretary of Labor in 1976. The FRA Guidance provides the same protections to railroad employees as provided under the 4R Act.

While providing the same substantive and procedural protections as the 4R Act, the FRA Guidance also recognizes important differences between the financial assistance provided under the 4R Act and FRA’s existing grant programs. Whereas the 4R Act provided financial assistance directly to railroads, many of FRA’s grant programs provide funding to non-railroad grantees (who are often public entities). FRA believes this difference is best addressed by expressly requiring grantees to flow down the required protections to the applicable railroad. This approach both ensures that the railroad employees are accorded the appropriate protections and aligns with the 4R Act framework that sets forth protections as between a railroad and its employees. In addition, railroads and their employees are best positioned to ensure compliance with these protections as they specifically understand what, if any, adverse impacts may arise as a result of a Federally financed project, and are of course, well versed in negotiating labor protections. Public entities, on the other hand, are not well positioned to understand the impacts to rail employees resulting from a Federally financed project. With that said,

grantees are able to enforce the employee protections through their contract with the relevant railroad (the FRA Guidance also recognizes that railroad employees, or their representatives, may notify a grantee of a dispute or controversy relating to the protections). As such, the FRA Guidance's flow down requirement allocates responsibility for the protections in a manner that maximizes compliance.

III. Comments

On March 4, 2022, FRA published a notice of proposed guidance in connection with the equivalent protective arrangements for railroad employees and sought public comment. 87 FR 12527. In preparing the FRA Guidance, FRA considered all public comments submitted to the **Federal Register**. The following commenters submitted comments in connection with the proposed guidance: the Transportation Trades Department AFL-CIO; the Brotherhood of Maintenance of Way Employees/IBT; the Brotherhood of Railroad Signalmen; the International Association of Sheet Metal, Air, Rail and Transportation Workers Mechanical Division; and the National Conference of Firemen And Oilers, 32BJ/SEIU. Comments are summarized and briefly addressed below.

The commenters stated that it was not sufficient for the FRA Guidance to require a grant recipient to flow down the requirements while making the railroad responsible for the actions necessary to implement the protections. Instead, the commenters stated that the FRA Guidance should provide that any grant recipient, whether a railroad or a non-railroad, of Federal financial assistance subject to 49 U.S.C. 22905(c) must take the actions necessary to provide and enforce the employee protective arrangements. Similarly, commenters also stated that the FRA Guidance did not sufficiently address the scenario in which a grant recipient contracts with a third party (and not the railroad itself) to perform railroad work activities. These comments requested that FRA revise the proposed guidance to require all grant recipients to provide the protections directly to the

adversely impacted railroad employees. FRA disagrees. As described above, section 2 of the FRA Guidance requires all non-railroad grant recipients to flow down the protective arrangement requirements to subsequent contracting parties, including railroads. As discussed above, FRA believes the flow-down requirement ensures that railroads and their employees comply with the required employee protections, when applicable, which is consistent with (and equivalent to) the 4R Act protections.

However, in consideration of these comments, FRA has made four modifications to the FRA Guidance. First, section 2 of the FRA Guidance now includes a sentence clearly stating that a grant recipient is responsible for ensuring compliance with the employee protections. Second, a new section 2(b) of the FRA Guidance requires a grant recipient to incorporate into an agreement, new or existing, with a railroad owning rights-of-way the requirement that the railroad notify its employees (and their representatives) of the project funded with financial assistance subject to 49 U.S.C. 22905(c) and the applicability of the employee protections. Third, a new section 2(c) of the FRA Guidance permits any railroad employee (or their representatives) to notify the grant recipient of a dispute or controversy related to these employee protections. Fourth, FRA has modified subsection 8(a) and section 9 to provide a clear mechanism for a railroad employee (or its representative) to dispute whether it would be affected by a project, including the ability to refer the dispute to arbitration. FRA believes this clarification will help address comments regarding the applicability of the protections in instances where a grant recipient contracts directly with a third party (and not the applicable railroad). Together, these four changes clarify the grant recipient's obligations to: ensure compliance with the employee protections; ensure railroad employees and their representatives are on notice of projects subject to the protections; ensure railroad employees and their representatives can notify the grant recipient of any dispute relating

to the protections; and provide a mechanism to resolve disputes as to whether a railroad employee is affected by a project.

A commenter suggested that the FRA Guidance should also apply to post-construction maintenance activities relating to Federally financed construction projects subject to the grant conditions described in section 22905(c). FRA disagrees. Pursuant to section 22905(c)(2)(B), the protections apply to those actions “taken in connection” with the project. FRA understands this language to limit the protections to the activities necessary to complete the project funded with FRA financial assistance. The protections do not extend to activities, like maintenance, that follow the completion of the project and which are not funded by FRA’s financial assistance.

FRA made several additional revisions to the proposed guidance. One commenter requested that the “Average Monthly Time” used to calculate displacement allowances be based on hours worked rather than days worked. FRA agrees with this change and modified subsection 1(b) accordingly. A commenter also requested that FRA revise the definition of the term “Dismissed Employee” to include employees who are “unable to secure another position by exercise of their seniority rights,” rather than the proposed language that excluded employees who “can secure another position by exercise of their seniority rights.” FRA agrees with this change and modified subsection 1(c) accordingly. A commenter also requested that FRA revise subsection 4(b)(ii) of the FRA Guidance, titled “Subject of Negotiations,” to clarify that changes to infrastructure, including rights-of-way, track, and signal and crossing systems, that may result in dismissal or displacement of protected employees or rearrangement of forces involving such employees shall be subject to review and negotiation by the parties to the extent necessary to ensure compliance with the FRA Guidance. FRA agrees with this proposed change and modified subsection 4(b)(ii) accordingly.

Issued in Washington, D.C.

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